

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON DAVID BRUNT,

Defendant-Appellant.

UNPUBLISHED

June 5, 2003

No. 234687

Calhoun Circuit Court

LC No. 00-004820-FC

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Defendant Jason David Brunt appeals as of right his jury conviction of two counts of assault with a dangerous weapon, MCL 750.82, for which he was sentenced to concurrent terms of 30 to 48 months' imprisonment. We affirm.

I. FACTS

This case stems from a physical altercation that occurred between a group of friends on October 31, 2000. Defendant and a group of friends went to the trailer of his friend Martin Robbins. Victor Drake, defendant's friend and original codefendant in the instant case, was already at the trailer when defendant arrived. James Fletcher, Robbins' long-time friend, was visiting from Tennessee. According to all witnesses, the five individuals were drinking, occasionally smoking marijuana, using cocaine, and getting along fine until defendant and Fletcher participated in a contest to determine who could drink a forty-ounce beer the fastest.

Defendant won the drinking contest, and Drake began laughing at defendant's self-congratulatory demonstration. Fletcher took offense to Drake's laughter and threatened Drake with physical harm. Defendant informed Fletcher that he would prevent Fletcher from harming Drake, and Fletcher challenged both defendant and Drake to fight him at the same time.

Witnesses then heard defendant strike Fletcher's head with a beer bottle. After he was hit with the bottle, Fletcher "slumped" over on the couch, and defendant and Drake both began punching him. The fight broke up shortly after it began, defendant and Drake left the trailer and walked to Drake's car, and Robbins attempted to restrain Fletcher inside the trailer. Fletcher overpowered Robbins and left the trailer in search of defendant and Drake. Drake had forgotten

to take his keys from the trailer, and he and defendant stood on opposite sides of Drake's car holding golf clubs when Fletcher approached defendant with raised fists.

Defendant struck Fletcher with enough force to break the golf club. Defendant continued striking Fletcher, and the golf club broke a second time. Defendant denied stabbing Fletcher with the club shaft, but Drake testified that defendant "poked" Fletcher with the broken club and continued kicking Fletcher after he fell to the ground.

Police were called to the scene and Fletcher was taken to the hospital. The emergency room physician testified that, despite his initial impression of Fletcher's bloodied and bruised body, Fletcher's injuries were not life-threatening. Fletcher sustained facial lacerations and several puncture wounds to his neck, chest, and torso. Fletcher's most serious injury was a through-and-through puncture wound to his left elbow, which damaged his radial nerve; even after surgical intervention, Fletcher may never recover the ability to flex the fingers of his left hand.

II. OFFENSE VARIABLE SCORING

Defendant first contends the trial court erred in refusing to change the scoring of three offense variables (OV) – OV 7, OV 10, and OV 14. We disagree.

A. Standard of Review

Application of the statutory sentencing guidelines is a legal question reviewed de novo on appeal. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). This Court reviews de novo the information on which a defendant's sentence guidelines were determined when a defendant challenges the factual basis of the information. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). This Court should affirm a trial court's OV scoring when sufficient evidence exists in support of the court's decision. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000).

B. Analysis

Defendant first argues that the trial court erred in refusing to reduce his OV 7 score from fifty points to zero. OV 7 assesses a criminal defendant's conduct for elements of terrorism, sadism, torture, or excessive brutality. MCL 777.37(1). The statute provides definitions of terrorism and sadism, but offers no definition of torture or excessive brutality. MCL 777.37(2)(a-b). According to the dictionary, "excessive" indicates a condition "beyond the usual, necessary, or proper limit or degree," and "brutality" means cruelty or savagery. *Random House Webster's College Dictionary*, 1997.

The trial court correctly scored OV 7 because defendant's conduct easily rose to the level contemplated by the Legislature's use of the phrase "excessive brutality." Defendant's continued use of the golf club – after it had twice broken from the force of defendant's blows to the victim – to strike and poke the victim as he lay on the ground is clear evidence of conduct beyond what might have been necessary to ensure defendant's own safety.

Further evidence, including defendant's own admission, indicated that he also kicked the victim after he had fallen to the ground. Even in light of defendant's claim that he acted only to prevent the victim from attacking him, defendant's conduct exceeded the force necessary to protect himself. Indeed, it was undisputed that the victim did not once initiate the physical contact between him and defendant. That defendant exceeded the force necessary to deal with the victim's drunken threats is supported by the physical evidence presented at trial. Defendant was uninjured. The victim was unarmed. Defendant first provoked the victim by smashing a beer bottle in his face. Instead of fleeing or locking himself in his friend's car, defendant waited for the victim and repeatedly struck him with a golf club. In this Court's opinion, the trial court was wholly justified by the record evidence in finding defendant's conduct excessively brutal for purposes of OV 7.

OV 10 addresses a defendant's conduct as it relates to the mental and physical condition of the victim. MCL 777.40. A range of points from 0 to 15 may be assessed for exploitive conduct, depending on how the defendant's conduct is classified. OV 10 was correctly scored here because the statutory language indicates that five points should be assessed in cases where "[t]he offender exploited a victim . . . who was intoxicated, under the influence of drugs, asleep or unconscious." MCL 777.40(1)(c). The record supports this score.

Defendant also argues that he should not have been assessed ten points for OV 14 – defendant's leadership role in the assault – because defendant's friend provided him with the golf club. See MCL 777.44. The trial court correctly noted that even if defendant's friend *had* masterminded the golf club distribution, defendant acted as the leader in the assault. Defendant alone initiated the assault inside the trailer, and defendant alone carried out the assault with the golf club, regardless of the club's source.

III. DEPARTURE FROM MINIMUM SENTENCE

Defendant next argues the trial court abused its discretion in departing from the minimum sentence recommended by the statutory sentencing guidelines. We disagree.

A. Standard of Review

This Court reviews for an abuse of discretion a trial court's departure from the minimum sentence ranges recommended under the statutory guidelines; a trial court's departure is not an abuse of discretion if objective and verifiable factors support the substantial and compelling reasons given by the court for the departure. MCL 769.34(11); *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001).

A trial court must adhere to the sentence ranges prescribed by the legislative sentencing guidelines; thus, a judge's discretion in departing from those ranges is limited to the legislatively prescribed circumstances for a departure. *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). A trial court may not base its departure on a characteristic of the offense or of the offender already considered by a defendant's OV and PRV scores unless the court specifically finds from the facts on record that a disproportionate or inadequate amount of weight was given the characteristic. MCL 769.34(3)(b); *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2002).

B. Analysis

The trial court here properly and adequately articulated a substantial and compelling reason for departing from the sentencing guidelines. The court clearly stated its finding that defendant's was "a case in which deviation from the guidelines is appropriate," and then the court detailed its reasoning for concluding that the guidelines did not adequately reflect the circumstances in which defendant committed the crimes.¹ Specifically, the court noted that defendant committed:

a continuous assault with two separate weapons, leading to extreme and irreparable injury, and in fact, perpetrated by a Defendant who, while expressing remorse today and to some extent regret previously, when questioned by the officer was not, in the least bit, sorry for what had happened and, in fact, justified it almost in a bragging fashion. This is a brutal case, and it merits a harsh sentence.

Although we affirm the sentence imposed by the trial court, we note that a sentencing court is required to articulate its reasons for departing from the guidelines range both on the record at sentencing *and* on the sentencing information report (SIR). MCR 6.425(D)(1); *People v Fleming*, 428 Mich. 408, 428; 410 NW2d 266 (1987). We note that in some instances, the holding of *Fleming*, which requires a remand to complete an SIR departure form, is not universally followed, often for good reasons. In *People v Kreger*, 214 Mich App 549, 554-555; 543 NW2d 55 (1995), this Court ruled that "the record indicates the trial court was aware of the

¹ Defendant correctly notes that the trial court did not complete a departure evaluation form. A trial court must make an oral record at the defendant's sentencing of the substantial and compelling reasons for departure, *and* the court must also make a written record on the appropriate form of the reasons stated at the sentencing. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Where a trial court satisfies one but not both of the above mandates, remand is necessary to allow the court to complete its task. *Fleming, supra*, 428 Mich at 428. This Court, in *Armstrong, supra*, 247 Mich App at 426, affirmed a trial court's four-fold upward departure from the minimum sentence recommended by the guidelines, but remanded the case to the trial court for the ministerial task of completing a departure form. The departure form, SIR88-2, appears in the *Michigan Sentencing Guidelines Manual*, 2001 Edition, as does the *only* language found that expressly mandates a trial court's use of the form:

If the judge imposes a minimum sentence that is a departure from the appropriate sentence range, the judge *shall state* on the record *and* on a departure evaluation form (SIR88-2), the aspects of the case that have persuaded the judge to impose a sentence outside of the recommended range. [2001 *Sentencing Guidelines*, 20 (emphasis added).]

The reproduction of the departure form is included in the manual references MCR 6.425(D)(1), but the language of the court rule only requires that "[n]ot later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator." No specific mention is made of the departure form.

guidelines at sentencing, [and] it would be a waste of judicial resources to remand the case to the circuit court for articulation of the reasons for departure.” Here, the trial court supplied its reasons for departure at the sentencing hearing but failed to complete a SIR departure form. See *id.* While defendant's convictions and sentences are affirmed, we remand for the ministerial task of completing the SIR guideline departure form. We would encourage our Supreme Court to provide a measure of clarity to the *Fleming* decision for consistency throughout our judicial system.

IV. SENTENCE PROPORTIONALITY

Defendant next asserts that even if the trial court's upward departure was justified, the six-month addition to his recommended minimum sentence represented a term of imprisonment disproportionate to the circumstances of the crime and the characteristics of defendant. We disagree.

A. Standard of Review

This Court reviews sentence proportionality for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Under the legislative sentencing guidelines, proportionality remains a proper consideration in reviewing a defendant's sentence where the trial court imposes a sentence outside the guidelines' range. *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). A defendant's sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Colon*, 250 Mich App 59, 65; 644 NW2d 790 (2002); *Milbourn*, *supra* at 635-636, 654. A sentence violates the principle of proportionality when it is not proportionate to the seriousness of the offense and not appropriate to the characteristics of the offender. *Milbourn*, *supra* at 635-636.

B. Analysis

In *Milbourn*, *supra* at 668-669, our Supreme Court concluded that the court abused its discretion because the defendant's severe sentence “left no room for the principle of proportionality to operate on an offender convicted of [the same offense] who has a previous record for this kind of offense or whose criminal behavior is more aggravated than [the defendant's].” In our opinion, defendant's sentence leaves adequate room for the principle of proportionality to operate in the case of the future criminal defendant convicted of felonious assault who, unlike the instant defendant, either had one or more previous convictions for a similar offense. Sentence enhancements under the habitual offender statutes would be available in those cases.

With regard to *Milbourn's* suggestion that the proportionality need also consider an offender's conduct more aggravated than the defendant's, we note that the instant defendant was convicted of the *least* serious charge on both counts – it is not likely, in our opinion, that an offender's conduct could be more aggravated than was defendant's conduct and still avoid, as did defendant here, being convicted of a more serious offense.

Affirmed but remanded for the ministerial task of completion of the SIR guideline departure form. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Hilda R. Gage

/s/ Bill Schuette